

## FEDERAL TRADE COMMISSION

## I N D E X

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## FEDERAL TRADE COMMISSION

In the Matter of: )  
REPORT TO CONGRESS PURSUANT TO )  
CAN-SPAM ACT. ) Matter No. P044405  
-----)

TUESDAY

FEBRUARY 10, 2004

Room 249

Federal Trade Commission

600 Pennsylvania Ave., N.W.

Washington, D.C. 20580

The above-entitled matter came on for  
conference, pursuant to agreement at 1:10 p.m.

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2  
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12  
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15 Word to the Wise

16 STEVE ATKINS, Word to the Wise

17 RAY EVERETT-CHURCH, Coalition Against

18 Unsolicited Commercial E-mail and ePrivacy Group

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1 P R O C E E D I N G S

2 MR. SALSBURG: Why don't we get started. This  
3 conference call is being transcribed by a court  
4 reporter.

5 MS. LAURA ATKINS: Okay.

6 MR. SALSBURG: So there will be a little bit of  
7 formality at the beginning of this, and that's the reason  
8 why.

9 Today is Tuesday, February 10. It's about 1:00  
10 p.m. Eastern time, and we're meeting today with Ray  
11 Everett-Church, Laura Atkins, and Steve Atkins who will be  
12 joining us shortly. They're all participating via  
13 telephone, and we're going to be talking today about a  
14 possible National Do Not E-mail Registry.

15 Since this meeting is being transcribed by a  
16 court reporter, and she doesn't have the benefit of  
17 seeing you speaking, this will especially be true when  
18 Steve shows up, if you can identify who you are when you  
19 speak, that would be of great benefit.

20 MS. LAURA ATKINS: Okay.

21 MR. SALSBURG: My name is Dan Salsburg. I'm an  
22 attorney with the Federal Trade Commission. I'm here  
23 today in this room with Colleen Robbins and with Sheryl  
24 Drexler. Colleen, Sheryl and I have been charged with  
25 the duty of drafting the report to Congress concerning a

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1 possible National Do Not E-Mail Registry.

2 Also in the room are Michelle Chua and Julie  
3 Bush, who have been charged with the task of drafting a  
4 report to Congress concerning a possible reward system  
5 for people who provide the government with information  
6 about spammers, and after we've talked some about the  
7 National Do Not E-Mail Registry, Michelle and Julie are  
8 going to want to discuss the contours of a possible  
9 reward system.

10 Why don't we start by, Ray and Laura, identifying  
11 who you are and your affiliations.

12 MR. EVERETT-CHURCH: Sure. My name is Ray  
13 Everett-Church. I am counsel to the Coalition Against  
14 Unsolicited Commercial E-mail, and I am also Chief  
15 Privacy Officer and Vice President for Consulting at  
16 ePrivacy Group, little E capital P. We're ePrivacy Group,  
17 which is a privacy and anti-spam consulting and  
18 technology firm.

19 MR. SALSBURG: Great. Laura?

20 MS. LAURA ATKINS: I am Laura Atkins. I'm the  
21 President of the SPAMCON Foundation and a Partner in a  
22 consulting firm, Word to the Wise. The SPAMCON  
23 Foundation is a nonprofit organization dedicated to  
24 keeping e-mail communications through a consulting group  
25 which works with mailers to make sure that what they're

1     sending isn't spam, and they're staying on the right  
2     side of the law as well as the correct side of keeping  
3     their users happy and making sure that their mail is  
4     delivered.

5             I believe Steve has just joined us.

6             MR. STEVE ATKINS:  Yes, I have.

7             MR. SALSBURG:  Great, Steve.  This is Dan  
8     Salsburg.  We had started by me explaining how we had a  
9     court reporter here transcribing the conversation.  So  
10    when you speak, if you could just identify that you're  
11    Steve Atkins, that would be helpful for the court  
12    reporter.  Could you tell us what groups you're with  
13    that have an interest in a Do Not E-Mail Registry?

14            MR. STEVE ATKINS:  Sure.  Steve Atkins.  I'm a  
15    Partner at Word to the Wise, so we work with a number  
16    of abuse desks and bulk mailers who are all interested  
17    in it.  I'm also the maintainer of SamSpade.org, which  
18    is a fairly major resource of people who are fighting  
19    spam.

20            I'm also connected with the IRTF, anti-spam  
21    Research Group, and we're looking at putting some  
22    standards together on this area.

23            MR. SALSBURG:  Thanks.  By way of background,  
24    Section 9 of the CAN-SPAM Act that was passed on  
25    December 16, 2003 directs the FTC to prepare and

1 transmit to Congress a report that sets forth a  
2 timetable and plan for establishing a National Do Not  
3 E-Mail Registry, and includes an explanation of any  
4 practical, technical, security, privacy, enforceability  
5 or other concerns that the Commission has regarding such  
6 a Registry, and it includes an explanation of how such a  
7 Registry would be applied with respect to children with  
8 e-mail accounts.

9           This report is due on June 16 of this year, so  
10 we have been trying to gather information quickly from  
11 as many sources as possible. Meetings like this one  
12 are a primary way that we can develop information that  
13 can help assist the Commission in preparing this report,  
14 so thank you so much for taking the time to join us.

15           Let me begin by throwing out a possible model  
16 for a Registry and hear your thoughts on it, because a  
17 Do Not E-mail Registry could take any number of different  
18 formats. Let's start with the one that I think we're  
19 probably all the most familiar with, and that's the model of  
20 the National Do Not Call Registry where consumers who  
21 desire not to receive unsolicited commercial e-mail  
22 would register their e-mail addresses with the  
23 Commission.

24           E-mail marketers who send unsolicited commercial  
25 e-mail would also be required to register with the

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1 Commission, and they would either obtain a copy of the  
2 list of registered consumers, which they would then  
3 scrub their marketing lists against, or they could  
4 provide a copy of their mailing lists to the Commission  
5 which would then do the scrubbing for them.

6 Let's start with you, Ray. What are your  
7 thoughts on such a model for a National Do Not E-mail  
8 Registry?

9 MR. EVERETT-CHURCH: Generally speaking I think  
10 the Do Not Call model works fairly well as a means of  
11 organizing a Do Not Spam List. Having a central  
12 location for consumers to register their e-mail addresses  
13 or for Internet Service Providers or corporations and  
14 other domain name owners to register centrally makes a  
15 great deal of sense in terms of ease of the user  
16 experience and will give folks the ability to go to one  
17 central place and be done with this particular function  
18 with a particular interaction.

19 Generally speaking, I think the functionality  
20 described in terms of making that list available to  
21 marketers to remove individuals from their mailing lists  
22 makes sense. Certainly those companies who are engaged  
23 in permission based e-mail marketing will have lists that  
24 they wouldn't necessarily need to scrub there, so this  
25 would really only effect those who were engaged in

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1     unsolicited commercial e-mails.

2             Scrubbing a list seems to be a fairly reasonable  
3     process in terms of the effort and expense that one  
4     might need to take to be engaged in that sort of  
5     business.

6             MR. SALSBURG:   Laura, what are your thoughts on  
7     such a model?

8             MS. LAURA ATKINS:   I think the model works,  
9     mostly in terms of the mechanics of actually handling  
10    the Registry and handling the e-mail addresses and  
11    getting them off of the list.

12            I think where it breaks down is that many people  
13    have multiple e-mail addresses where say they only have  
14    one or two phone numbers, so I think in general, it's a  
15    good model, but my concern is what burden are we putting  
16    on an individual to make sure that all 15, or if you're  
17    like me, all multiple hundreds of e-mail addresses that I  
18    have are on the list?  I think that is something that is  
19    critical to address.

20            MR. SALSBURG:   And Steve?

21            MR. STEVE ATKINS:   I think it's a nice idea, but  
22    I have a number of concerns.  One of them is  
23    enforcement.  If it's not enforced, then the approach is  
24    fairly irrelevant.  On technical concerns, almost every  
25    user and most ISPs actually have an infinite number of

1 e-mail addresses that will deliver to them. If there is  
2 an explicit list of e-mail addresses that marks say  
3 they're not allowed to deliver to, they'll still be  
4 easily generated, easy to work out e-mail addresses that  
5 will deliver to the same people.

6 For instance, I could list steve@blighty.com, my  
7 main e-mail address, on the Do Not Mail List, but Steve  
8 dash anything at all, like a .com, will also deliver  
9 to me. ISPs do this in a lot of different ways, so many  
10 ISPs provide multiple e-mail addresses to each user, even  
11 if the user doesn't know about them, so that's  
12 definitely a concern.

13 I think also that in addition to individual  
14 things being worked out, there would have to be the  
15 possibility for people or main organizations to be  
16 worked out, for them to say that none of our employees  
17 wish to receive spam or none of our users wish to  
18 receive spam.

19 I think those are the biggest implementation  
20 issues that I can think of.

21 MR. EVERETT-CHURCH: This is Ray  
22 Everett-Church. I think that there are some  
23 implementation questions and sort of technical minutia  
24 that need to be dealt with, but I also want to urge the  
25 Commission not to get lost in the weeds of trying to

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1 craft a solution that fits every permutation of every  
2 Internet Service Provider with a particular design.

3 For example, yes, I'm quite aware that many  
4 Service Providers offer the ability to have multiple  
5 e-mail addresses, including infinite numbers or nearly  
6 infinite numbers, based upon using some sort of  
7 qualifying character like a dash or a plus sign, but  
8 bear in mind that the CAN-SPAM Act to a certain extent,  
9 prohibits the generation of e-mail addresses through  
10 dictionary methods.

11 Now, I happen to think that there's particular  
12 wording of that prohibition that is problematic, but be  
13 that as it may, there are some limiting factors there  
14 that will work to address some aspects of the potential  
15 problem with multiple addresses for a single individual.

16 MS. LAURA ATKINS: Right, and this is Laura  
17 again. I think the concerns that a lot of us have,  
18 particularly those who have been online for a long time,  
19 is that we've got addresses that are scattered around  
20 ISPs everywhere, so that they don't actually have to go  
21 create them. They just have to buy another million CDs  
22 and make sure all those addresses that are currently on  
23 a million CDs are actually on a Do Not E-mail List.

24 I mean, I've got e-mail that delivers to domains  
25 that the only way I know those domains delivered to me,

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1 and we're not talking user parts, we're talk domain  
2 parts, is when I get spam from them, and they've been on  
3 CDs for many, many years.

4 So while I understand what Ray is saying, I  
5 think it's not as much minutia as it might be. I think  
6 it's an important concern, and it's important to address  
7 when planning the whole Registry that you need to know  
8 the technology is out there and acknowledge that there's  
9 probably some cases that can be addressed.

10 MR. STEVE ATKINS: This is Steve Atkins again.  
11 A Do Not Call Registry is a technical minutia. As such  
12 you really do need to consider the technical details.

13 MR. SALSBURG: Right. Let's turn from the  
14 technical issues surrounding this model of a Registry,  
15 to security, which is one of the other factors that the  
16 report calls on us to address.

17 How tempting would a Registry of valid e-mail  
18 addresses to be to a spammer?

19 MR. STEVE ATKINS: Steve Atkins. The Do Not  
20 Call List is I understand being sold as a list of phone  
21 numbers for local households. I have no reason to  
22 believe that the less ethical spammers would do anything  
23 else.

24 MR. SALSBURG: Does that raise a concern for  
25 you, Laura, or for you, Ray?

1           MS. LAURA ATKINS: Certainly, because people  
2     seem to be adding their e-mail addresses to these lists  
3     and then still getting e-mail, and is at issue in a few  
4     cases. One is it's just somebody who is now receiving  
5     e-mail and they have explicitly said, "No, I don't want  
6     it," and two, it's an enforcement issue for the FTC.

7           These spammers buy lists and share them around  
8     promote them and put out claims about them, but none of  
9     those are really true, so now you have a spammer who has  
10    a guaranteed list of e-mail addresses that are valid. He  
11    can sell those, and now the FTC has multiple people who  
12    are e-mailing them saying, "We're getting spam, even  
13    though we're on the Do Not Spam Registry."

14          I think it should be a concern of the FTC of how  
15    are we going to police the people who are selling the  
16    list, which goes back to enforcement, which is an  
17    utterly critical part.

18          MR. EVERETT-CHURCH: This is Ray Everett-Church.  
19    I agree wholeheartedly that enforcement will be a critical  
20    component to this, but I think with strong and vigorous  
21    enforcement, the risks can be significantly mitigated.  
22    For example, it's quite easy to feed names on to lists  
23    that will become an indicator of a potential sale of this  
24    list, and this is assuming that the list is distributed in  
25    a plain e-mail address format.

1           There are cryptographic prophecies by which you  
2   can encode the list such that it is not distributed as a  
3   list of e-mail addresses but rather as a list of hashes  
4   of e-mail addresses that could be compared against an  
5   existing list but cannot be used to derive unknown e-mail  
6   addresses.

7           That process is fairly well established and  
8   lists that have been maintained properly have used that  
9   in some cases in direct marketing situations as well.

10          MR. STEVE ATKINS: That cryptographic approach,  
11   this is Steve Atkins, only works if you only allow each  
12   user to have a small number of e-mail addresses. The  
13   fact that that's not the case makes it much more  
14   difficult to use crypto cookies and that sort of thing.

15          MR. SALSBURG: Why is that?

16          MR. STEVE ATKINS: Because if I have the e-mail  
17   address, steve@blighty.com, one way to protect that from  
18   being harvested is to have a cryptographic function that  
19   takes an e-mail address and turns it into a unique  
20   cookie, a unique string, but not reversibly, so if I  
21   have the string, I can't get the e-mail address back.

22          Then when somebody else sells the list, you take  
23   their e-mail address, convert it into that unique cookie,  
24   and then you maintain the list or the list of these  
25   unique cookies. Then you can give that list of unique

1 cookies to a bulk mailer. They take their list of e-mail  
2 addresses and perform the same operation on them to  
3 match each of their e-mail addresses off of this  
4 unique string.

5 They then can compare those strings against the  
6 lists of encrypted strings that the FTC distributes to  
7 them, and that way they can easily remove the list of  
8 e-mail addresses from their list, without ever actually  
9 seeing the e-mail addresses on the list.

10 MR. SALSBURG: All right. Or alternatively,  
11 they could compile a subset of the registry?

12 MR. STEVE ATKINS: Absolutely, that's one  
13 problem, but the other problem is is that the string --  
14 when steve@blighty.com is not a unique string, Steve  
15 dash anything else at blighty.com will not be matched on  
16 the same string, which means there's no way to do wild  
17 card removals which it's going to be vital.

18 MR. EVERETT-CHURCH: Understood, although if  
19 you're doing a wild card removal, I think the dash or  
20 plus dash situation is a unique situation, but in terms  
21 of wild card removal, certainly domain based wild card  
22 removals would be easily done, and I think providing a  
23 list of simply unencrypted domain names is not a risk,  
24 is not a problem.

25 MR. STEVE ATKINS: Well, a number of ISPs give

1 domains to each of their users, and any e-mail at that  
2 name will be delivered to that user, such distributing  
3 that list of unencrypted domain names is in many  
4 cases equivalent to distributing the list of unencrypted  
5 e-mail addresses.

6 MR. EVERETT-CHURCH: This is Ray Everett-Church  
7 again. I think that there are some outlying situations  
8 that may need to be discussed, but may not need to be a  
9 limiting factor in terms of the broader reach of this  
10 sort of proposal.

11 MR. SALSBURG: Let me throw out another  
12 question.

13 MR. EVERETT-CHURCH: If I can just make one more  
14 quick point. At the end of the day, if people are sent  
15 spam and are on the Do Not E-mail List, regardless of how  
16 the e-mail address was uncovered, through whatever fraud,  
17 deception or other criminality which results in an  
18 illegal use of the database, the fact that people are  
19 receiving e-mails to addresses that appeared on the list  
20 would still invoke the prohibition on that e-mail and  
21 would still be a matter of enforcement.

22 So a strong, vigorous enforcement capability,  
23 including I think a right of action for consumers, needs  
24 to be considered as well because ultimately, however an  
25 e-mail address comes through a piece of unsolicited



1 e-mail, if that e-mail appears on the database, then the  
2 mailer should not be sending that mail in the first  
3 place, and that's the bottom line.

4 MR. SALSBURG: So would a Do Not E-mail Registry  
5 along the lines of the National Do Not Call Registry be  
6 ineffective without a private right of action?

7 MR. EVERETT-CHURCH: I don't think it would be  
8 ineffective. I think it would be significantly less  
9 effective. This is the same concern I have with the  
10 CAN-SPAM Act as it stands today, with only ISPs,  
11 Attorneys General and the FTC having enforcement powers  
12 there.

13 Without a significant allocation of resources to  
14 the Federal Trade Commission or to State Attorneys  
15 General and without some change in the fundamental  
16 economics of private lawsuits to encourage greater  
17 activities faced by more Internet Service Providers,  
18 you're going to see a law with little to no enforcement,  
19 and that does no one any good.

20 MR. STEVE ATKINS: This is Steve Atkins. The  
21 other side of that is that there have been experiences  
22 from the state laws that private rights of action can  
23 lead to a large number of frivolous lawsuits.

24 MR. EVERETT-CHURCH: That's a problem addressed  
25 by the intelligent drafting of the law. There are

1 instances in which state legislatures, in their infinite  
2 wisdom, have drafted laws susceptible to abuse, and  
3 those can be addressed and drafted.

4 MR. SALSBURG: We appreciate your thoughts on  
5 this, but maybe the better phone call for this  
6 conversation is if Congress asked us to do a report on  
7 private rights of action.

8 Let's move on to the enforceability issue which  
9 is one you all have raised. How would the FTC, if there  
10 was the Do Not E-Mail Registry, be able to identify people  
11 who violated the requirement?

12 MS. LAURA ATKINS: This is Laura. The one that  
13 comes immediately to -- well, there's two things that  
14 come to mind. One would be seeding addresses on to the  
15 Do Not Spam Registry, and those would be both addresses  
16 that the FTC would own and use and possibly addresses  
17 from people who were individuals who will answer both  
18 the FTC and who had, quote, "donated unused addresses" or  
19 whatever to put in seed addresses, so that the people  
20 who are buying lists couldn't scrape off the FTC's seed  
21 addresses, so those addresses would be held in  
22 confidence.

23 The other way would be to take reports from  
24 individuals, and the FTC collects more spam probably  
25 than anybody on the face of the planet right now, and

1 again to go through that and to have a separate address  
2 set up for e-mails that is received or spam that's  
3 received at addresses that are on the Do Not E-mail List,  
4 that strikes me as the two blatantly obvious ways to do  
5 it.

6 MR. SALSBURG: Under this proposed model, I'm  
7 the consumer and I don't get much spam. Should I  
8 register or am I inviting more danger by registering?

9 MS. LAURA ATKINS: If it were me and I had an  
10 address that did not get much spam, I would not register.

11 MR. EVERETT-CHURCH: This is Ray  
12 Everett-Church. If spam is not a problem for an  
13 individual, I think they would not be tempted to go out  
14 of their way and register an e-mail address. Again I  
15 think it's the list of -- if abuses of the lists are  
16 well policed, there should be relatively little risk in  
17 inputting your name on that List, and as long as there  
18 is enforcement of violators of lists, any such abuses  
19 arising from someone appearing on the List could be  
20 significantly mitigated.

21 MR. STEVE ATKINS: This is Steve Atkins. I  
22 think that depends drastically on how the List is  
23 implemented. If the List allows domain based wild  
24 cards, that's one thing. If it doesn't, I foresee the  
25 ISPs whenever a new account is created, adding it to the

1 List.

2 At that point I would see either a check box  
3 through an account creation where the end user can check  
4 it or not or simply by default, "We add all new accounts  
5 to the FTC Do Not Spam List. In that case there would  
6 be a huge number of e-mail addresses added to the list.

7 MR. SALSBURG: What do you envision in terms of  
8 the self-policing of the list? Would it be self-  
9 policed by the senders who scrub it, or would the ISPs  
10 have a role in using this data that was on the list in  
11 conjunction with their anti-spam filters?

12 MS. LAURA ATKINS: I'm not sure I understand the  
13 question.

14 MR. SALSBURG: Sure. Do you envision that the  
15 model would work like the Do Not Call List where the  
16 telemarketers scrub their telemarketing list, or would  
17 the ISPs have a role in getting the data of who's on the  
18 list and modifying their anti-spam filters to  
19 accommodate them?

20 MR. STEVE ATKINS: The former. The  
21 responsibility lies solely with the sender. The  
22 telemarketers would be the ones that would be scrubbing  
23 that list against the FTC Do Not Spam List. Whether  
24 they would do that or not would be another question, but  
25 it certainly doesn't lie with the ISPs spam filters.

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1           MR. EVERETT-CHURCH: Ray Everett-Church.  
2       Barring some substantial change in e-mail protocols or  
3       some other methodology by which an ISP could divine the  
4       permission basis and intent behind a particular e-mail  
5       address or a particular e-mail, then it would be very,  
6       very difficult for an ISP to block mail using some form  
7       of the Do Not E-mail List to any useful end.

8           MR. SALSBURG: Besides a model registry that  
9       worked like the Do Not Call Registry, can you conceive  
10      of any other ways that a Do Not Spam List would work?

11          MS. ROBBINS: Any other way that it could be  
12      constructed?

13          MR. STEVE ATKINS: Not that likely could be  
14      implemented. I think that the concept of a Do Not Call  
15      List or a Do Not Mail List is fairly understood among  
16      the legitimate direct marketing population. They will  
17      understand the Do Not Spam List.

18          The interesting question is: What is spam?  
19      What mailings do they need to scrub off of it? That's  
20      going to be complex, but I think it's going to have to  
21      be done. I think it's a bad idea, but I think if it's  
22      going to be done, the only sensible way to do it is to  
23      model it after the Do Not Call List.

24          MR. EVERETT-CHURCH: This is Ray  
25      Everett-Church. I think this is really the only way I

1 can conceive of implementing it in a fashion similar to  
2 the Do Not Call List. I just conceive of another format  
3 which would be as effective.

4 MR. SALSBURG: Would a domain wide opt-out  
5 registry be as effective?

6 MR. STEVE ATKINS: Yes. Steve Atkins, yes.

7 MS. LAURA ATKINS: I think the only way that a  
8 Do Not Spam List can actually be effective is if domain  
9 wide opt outs are allowed.

10 Anything else puts way too much burden on  
11 businesses, and it's like hewlettpackard.com or  
12 xerox.com. Those would have the right to say, "We don't  
13 want our users getting foreign spam," and I think that  
14 anything else that requires them to individually opt-out  
15 however many thousand employees they may have is overly  
16 burdensome.

17 MR. EVERETT-CHURCH: This is Ray  
18 Everett-Church. I agree, absolutely. It's vital that  
19 any Do Not E-mail List proposal include a domain wide  
20 opt-out process. In fact, if the Commission found that  
21 an individual e-mail address opt-out list produced too  
22 many security risks and technical burden that a domain  
23 wide opt-out list would still work and still provide a  
24 great deal of relief to already burdened resources and  
25 individuals.

1           MR. SALSBURG: If the majority of spam right now  
2 comes from non law abiding citizens, people who aren't  
3 complying with the CAN-SPAM Act, people who are selling  
4 questionable goods and services, why should we expect  
5 there to be a high compliance rate with the Registry  
6 requirement?

7           MS. LAURA ATKINS: We shouldn't. Unless there  
8 is significant enforcement on the part of the FTC or  
9 whatever the enforcement body becomes, we shouldn't  
10 expect any compliance. The only way you're going to  
11 convince them to do this is to actually convince them  
12 that there are penalties if they don't.

13          MR. EVERETT-CHURCH: This is Ray  
14 Everett-Church. You know, you dismiss the issue of  
15 consumer private right of action, and I understand  
16 you're trying to focus this on the Do Not E-mail List  
17 requirements, but I think it is an important thing to be  
18 said that without a vigorous enforcement mechanism, this  
19 Do Not E-mail List would be just as useful as any other  
20 unenforced solution.

21          The fact that there are people engaging in spam  
22 who are already breaking any number of any other laws is  
23 not a failure of the spam laws, but the failure of the  
24 enforcement of those other laws as well, and again we  
25 come back to the issue of enforcement and how to

1 generate more enforcement in order to make laws more  
2 effective.

3 I think that it is important to note that a  
4 private right of action would be one method of  
5 increasing the risk to spammers to those who are already  
6 violating the law by creating a greater risk of  
7 enforcement through alternative enforcement means.

8 MR. SALSBURG: If there were a Registry, either  
9 the domain wide opt-out or an individual opt-out  
10 registry, what kind of e-mail should be covered? Should  
11 it be all commercial e-mail or just unsolicited  
12 commercial e-mail.

13 MS. LAURA ATKINS: Just unsolicited commercial  
14 e-mail.

15 MR. STEVE ATKINS: Steve Atkins, otherwise I  
16 can't opt-in. That prevents me from getting mail I  
17 want.

18 MS. LAURA ATKINS: So it really should only  
19 cover the unsolicited bit, put the choice back in the  
20 hands of the consumer to receive the mail they want, and  
21 they need to be able to receive mail they actually asked  
22 for.

23 MR. SALSBURG: Should there also be an exception  
24 for established business relationships?

25 MR. STEVE ATKINS: I believe there should be,



1     yes, but that exception should be possible to be  
2     revoked, so if I have a business relationship with  
3     somebody, they should be able to send me e-mail, even if  
4     I'm not on the Do Not Call List, but if I tell them,  
5     "Stop," then that should again be covered by the Do Not  
6     Spam List.

7             MR. EVERETT-CHURCH: This is Ray  
8     Everett-Church. Indeed I think that is, in some  
9     respects, contemplated under the CAN-SPAM Act already,  
10    in which individuals are given the opportunity to or are  
11    required to be given the opportunity to opt-out of  
12    e-mails that may be permission based or through a  
13    business relationship as well as unsolicited.

14            I think that a Do Not E-mail List must inherently  
15    focus on unsolicited commercial e-mail and leave the  
16    question of solicited commercial e-mail to the  
17    relationship between the consumer and the business and  
18    provided there is again the ability to enforce any  
19    violation of the opt-out requirement.

20            MR. STEVE ATKINS: A more serious question is,  
21    What size of company is going to be required to use the  
22    Do Not Spam List? If I, as an individual send commercial  
23    e-mail to three people, am I liable if any of those three  
24    people are on the Do Not Spam List? It's very different  
25    than telemarketing when telemarketing is done by big

1 dedicated companies. A lot of commercial e-mail, if it  
2 is unsolicited, is sent in small volumes by very small  
3 companies and individuals.

4 MR. SALSBURG: So the question is: If there  
5 were a Registry, should there be some sort of exemption  
6 for the small time e-mailer?

7 MR. STEVE ATKINS: And I think the answer to  
8 that is, well, they shouldn't, but it's going to be  
9 virtually impossible to enforce against a small outfit,  
10 but if it is enforced, there can be against those  
11 frivolous lawsuits against people. It's a very  
12 complicated area, the small end of the business.

13 MR. SALSBURG: Should entities outside of the  
14 FTC's jurisdiction be covered, such as nonprofits or  
15 banks or common carriers?

16 MS. LAURA ATKINS: I believe so, yes, but that  
17 is more again from a consumer protection end, and the  
18 consumer expectation end, and I know you guys have  
19 addressed this with the Do Not Call List and that there  
20 are exceptions to it.

21 If it is a Do Not Spam List, I think it's  
22 important that it cover everything. One of the biggest  
23 sources of spam right now is actually mortgage spam, and  
24 so if you're going to exempt financial institutions  
25 because they're not under the purview of the FTC, you're not

1 really going to effect all the spammers that are out  
2 there right not.

3 MR. SALSBURG: Do you envision companies outside  
4 of the United States would be subjected to the Registry  
5 requirements?

6 MS. LAURA ATKINS: That's a really complicated  
7 issue in terms of do you mean the companies who are  
8 sending the spam who owns the machines that the mail is  
9 coming from or company that is hiring to advertise for  
10 them?

11 I think certainly that companies in the U.S. who  
12 are attempting to go offshore to mail into the U.S.,  
13 that they should absolutely be held liable for what  
14 they're doing, and in that case the advertisers should  
15 be held responsible.

16 MR. EVERETT-CHURCH: This is Ray  
17 Everett-Church. I think that -- I think we've seen in  
18 the passage of the CAN-SPAM Act the extension of the  
19 junk faxes prohibition to offshore junk faxes who are  
20 faxing into the United States.

21 I think that while again the enforcement issue  
22 is the listening factor, I think basically any of the  
23 same jurisdictional arguments that would apply to anyone  
24 operating outside of the United States any law  
25 enforcement sort of situation would arise in this sort

1 of circumstance of applying the Do Not E-mail List to  
2 offshore entities.

3 I think those issues are for better or worse  
4 pretty well settled and should be looked to in terms of  
5 the effectiveness of a requirement placed on someone  
6 offshore, not to whether or not we should attempt to  
7 exempt them or specifically target them. I think it's  
8 important that this be a standard applicable to anybody  
9 under the jurisdiction of the U.S. court and U.S. law  
10 regardless of where they're e-mailing from there.

11 MR. SALSBURG: Considering it costs the same as  
12 it does from somewhere abroad, do you think that a  
13 Registry requirement, even if vigorously enforced, would  
14 lead to the migration of spammers abroad?

15 MS. LAURA ATKINS: If they get an exemption from  
16 using the list by being offshore, then yes.

17 MR. SALSBURG: What if they get no exemption,  
18 but it's impossible to enforce when they're all located  
19 in a foreign country?

20 MS. LAURA ATKINS: The net effect is the same.  
21 If enforcement can't happen because they're not in this  
22 country, then, yes, they will go.

23 MR. EVERETT-CHURCH: This is Ray  
24 Everett-Church. I think there would be little net loss  
25 to the nation if all of these illegal operators picked

1 up and were forced to move their operation to Moldova  
2 or somewhere. I think that in fact in some of those  
3 cases, it can make it actually easier to identify them  
4 and to deal with them through technical means, certainly  
5 not a fantasy or a simply solution, but it certainly  
6 pushes them more to the fringes.

7 The reality of spam is that the vast majority of  
8 is coming from folks who have well known established  
9 operations in Detroit and Las Vegas and Boca Raton,  
10 Florida. Those folks are easily reached and are not  
11 likely to pick up and move themselves and their families  
12 and their luxury homes and fancy cars to a foreign  
13 locale just to continue this operation. But if they  
14 did, good riddance.

15 MR. SALSBURG: Do you all have any privacy  
16 concerns with the government maintaining a list of  
17 valid e-mail addresses?

18 MR. STEVE ATKINS: This is Steve Atkins. The  
19 government already maintains a list of valid e-mail  
20 addresses.

21 MR. SALSBURG: How about letting me have access  
22 to that list?

23 (Laughter.)

24 MR. EVERETT-CHURCH: This is Ray  
25 Everett-Church. I think that the greatest concerns here

1 are sort of the dire overwhelming type rather than real  
2 practical concerns. I think maintaining a list of valid  
3 e-mail addresses is not in my mind a tremendous privacy  
4 risk or a threat to the civil liberties given the ease  
5 with which people can change their e-mail addresses, in  
6 fact, and provided the availability of anonymous e-mail  
7 accounts and e-mail anonymizers.

8 MS. LAURA ATKINS: That does imply though, Ray,  
9 that they have no other information about the individual  
10 other than the e-mail addresses, so it's not an e-mail  
11 address to my home phone or whatever. That certainly  
12 has grave privacy implications I think, but if it's just  
13 a list of e-mail addresses, I have less issue with it.

14 MR. STEVE ATKINS: Steve Atkins. My only  
15 concern about that is that if we reach a situation  
16 whereby the Do Not Spam List does not apply, for  
17 instance, to nonprofit and politicians, then it is  
18 obvious that there will be a lot of people who wish to  
19 use the Do Not Spam List as a marketing list if it is  
20 not enforced against all potential mailers.

21 For the government to have a large list with  
22 deliverable addresses and politicians to which to  
23 advertise via e-mail and then not being covered by the Do  
24 Not Spam List, there's obviously a concern there.

25 MR. EVERETT-CHURCH: This is Ray

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1     Everett-Church. Frankly, I'm more concerned on any  
2     given day about the database maintained on me by  
3     Experian --

4             MR. STEVE ATKINS: Me too.

5             MS. LAURA ATKINS: Me too, absolutely.

6             MR. EVERETT-CHURCH: -- than the FTC databases  
7     of e-mail addresses.

8             MR. SALSBURG: Let me throw out another possible  
9     Registry format and get your opinions whether it's  
10    better or worse than the models we've been discussing  
11    and why. Here's the model: Consumers would enter  
12    their addresses into the Registry with the Commission,  
13    which would then be provided to an e-mail forwarding  
14    service approved by the Commission, not to the actual  
15    e-mail marketers themselves. The Commission would  
16    establish some privacy and security requirements for the  
17    forwarding services.

18            Then e-mail marketers would be required to  
19    register with the Commission and send all of their  
20    unsolicited commercial e-mail to a registered forwarding  
21    service, which would then scrub the marketing lists  
22    against the Registry and forward only those e-mails to  
23    addresses that were not on the Registry. Do you follow  
24    the model?

25            MR. EVERETT-CHURCH: Yes.

1 MR. STEVE ATKINS: Yes.

2 MR. EVERETT-CHURCH: This is Ray Everett-Church.  
3 If you could get a law like that passed, more power to  
4 you. I think you would hear such an outcry from legitimate  
5 e-mail marketers that this is granting sort of an e-mail  
6 monopoly to one or a handful of E-mail Service Providers  
7 that it would not get very far as a proposal.

8 MR. STEVE ATKINS: I tend to agree. Also the  
9 cost of the implementing that sort of thing would be  
10 very high, and as such, the costs passed on to the e-mail  
11 marketers would be very high, and it would probably push  
12 a lot of legitimate e-mail marketers out of business, so  
13 they will fight tooth and nail against it. I'm not  
14 convinced it's a great idea anyway.

15 MR. SALSBURG: What are your other concerns?

16 MR. STEVE ATKINS: I do have some concerns about  
17 putting in such choke points. The Internet is a fairly  
18 distributed system, and it has a lot of advantages.  
19 Changing it to being a centrally system, which is  
20 roughly what you're doing there, a lot of technical  
21 issues as well as a lot of privacy issues.

22 MR. SALSBURG: So in terms of the choke point  
23 issue, the concern would be that a piece of spam which  
24 otherwise had many roots it could take would now only  
25 have one and if that's disabled, the spam would not go



1 through?

2 MR. STEVE ATKINS: No, I'm concerned about the  
3 amount of legitimate e-mail from one of my vendors to me  
4 will be rooted through a government controlled or  
5 government licensed server.

6 MR. EVERETT-CHURCH: This is Ray  
7 Everett-Church. Because of the potential for confusion  
8 and concern about whether or not a particular mailing is  
9 going to be subject to these sorts of requirements or  
10 limitations, I would imagine a lot of e-mailers might  
11 just simply throw up their hands, err on the side of  
12 caution and send more mail through such a system,  
13 including mail that wouldn't necessarily be required,  
14 but for fear of a breach of law, they would do it  
15 nonetheless.

16 I think that at least for the companies that  
17 I've dealt with over the years, erring on the side of  
18 caution in that fashion would cause them to make use of  
19 this system and to their detriment.

20 I think that Steve's concerns about a  
21 centralized choke point are quite significant, and that  
22 would certainly place one entity or a handful of  
23 entities in the position of eventually controlling a  
24 segment of the industry, and that's a dangerous thing  
25 from many aspects.

1           MR. SALSBURG: Laura, do you have any thoughts  
2 on this?

3           MS. LAURA ATKINS: I think both Ray and Steve  
4 have covered mine pretty well. I think the technical  
5 implementation is going to be expensive and difficult to  
6 do, and I don't think there's any real benefit in doing  
7 that in terms of letting people not get the spam they  
8 don't want, plus getting the mail they do want, and I  
9 think Ray's concerns that marketers sending solicited  
10 mail are going to mail through there just in case is a  
11 very good one.

12          MR. SALSBURG: So it could have a chilling  
13 effect.

14          MS. LAURA ATKINS: Yes.

15          MR. STEVE ATKINS: Yes.

16          MR. SALSBURG: Let me offer another possible  
17 model and hear your thoughts on this. This would be a  
18 Registry that would have no consumers or any e-mail  
19 addresses in it. It would be a Registry of  
20 authenticated e-mail marketers, essentially a giant  
21 whitelist that would be maintained by the Commission.  
22 Under this model, a registered e-mail marketer  
23 would get a registration number from the FTC, would  
24 have to include this registration number in the header  
25 of any commercial e-mail that it sent, and it would

1     also have to register with the Commission the IP  
2     addresses and domain names it was going to be sending  
3     commercial e-mail from.

4             These databases of registration numbers, IP  
5     addresses, and domains would be provided to ISPs and  
6     domain owners who could then adjust their filters to  
7     prevent any e-mail from going through that doesn't have  
8     a matching IP address and registration number.

9             MR. STEVE ATKINS: This is Steve Atkins. The  
10    suggestion that only registered IP addresses would be  
11    allowed to send e-mail, therefore that would tend to be  
12    for bulk mail senders?

13            MR. SALSBURG: It would be for bulk mail vendors  
14    of commercial e-mail.

15            MR. STEVE ATKINS: Then they would have pretty  
16    much minimal effect on spam because the big ISPs already  
17    know exactly where all the large bulk mailers are, and  
18    while some spam comes from those, there tends to be a  
19    reasonably good working relationship between the  
20    legitimate bulk mailers and the ISPs that resolves  
21    problems as needs, and if necessary simply blocks mail  
22    from them.

23            That's already in place, but a huge amount of  
24    spam is not coming from legitimate bulk mailers, so if  
25    the intent for this was to actually have an impact on

1 the amount of spam sent, I don't think it would have  
2 that big of an improvement as the expense of quite a lot  
3 of overhead.

4 MR. EVERETT-CHURCH: This is Ray Everett-Church.  
5 Really my central concern is that this further  
6 institutionalizes the fact that the burden is placed on  
7 the recipients to do the heavy lifting of stopping spam,  
8 stopping unwanted e-mails and further in hindering mailers  
9 to continue mailing and reinforcing today's situation where  
10 it's the recipients who are bearing all the burdens, the  
11 costs of dealing with unwanted e-mail.

12 A mechanism of having a registration process and  
13 some header that is filtered upon does nothing to reduce  
14 the load, the burden on recipients, and simply  
15 reinforces the fact that mailers get to do what they  
16 want and it's the recipients who have to clean up the  
17 mess.

18 MR. SALSBURG: Would such a Registry make  
19 enforcement of the other provisions of the CAN-SPAM Act  
20 easier?

21 MR. STEVE ATKINS: This is Steve Atkins. No, it  
22 wouldn't, because legitimate bulk mailers who are  
23 mailing from their own IP addresses are already fairly  
24 trivial to track down, and I think that would be the  
25 only addition it could give you.

1           MR. SALSBURG: How is that exactly, if the only  
2           unsolicited commercial e-mail that was getting through  
3           had to have a matching registration number and valid IP  
4           address?

5           MR. STEVE ATKINS: How would you make that  
6           happen without mandating that every single piece of  
7           e-mail must be sent from a federally licensed IP  
8           address? You just can't do that, and you're only  
9           affecting the legitimate people who are not actually the  
10          biggest part of the problem, which are the ones that  
11          would actually license their IP address in that way.

12          MS. LAURA ATKINS: And who are already complying  
13          with CAN-SPAM in terms of typical addresses and non  
14          forced headers and clear and conspicuous notice. That's  
15          the majority of legitimate people who are already  
16          complying, so having a Registry I don't think will help  
17          track them down any easier because the legitimate ones  
18          are attempting to be as transparent as possible.

19          Those IP addresses are fairly easy to track in  
20          that they're registered to those domains. You can go to  
21          the ISP and talk to the ISP or they're directly  
22          registered to the bulk mail itself.

23          MR. SALSBURG: Is that the same criticism that  
24          you would have of the first model of a Do Not E-mail  
25          Registry we talked about -- that the legitimate senders

1     who are already providing valid opt-out mechanisms would  
2     be the only ones that would be complying with the  
3     Registry requirement?

4             MR. STEVE ATKINS: Well, this is Steve Atkins.  
5     That would be one criticism, there would be some  
6     advantages to that because it does mean that those  
7     spammers who want to be legitimate can get a single list  
8     opt-out from all the legitimate spam senders and not  
9     knowing which one is legitimate and which ones aren't,  
10    legitimate meaning that they will actually remove you  
11    from that list, but in terms of it not having much  
12    impact against the illegitimate spammers, yeah, the  
13    criticism is similar.

14            MR. EVERETT-CHURCH: This is Ray  
15    Everett-Church. At the end of the day the question is,  
16    what is the experience of the consumer going to be, and  
17    if there are a million legitimate e-mailers out there  
18    that you can opt-out one rather than opting out a  
19    million times, the savings to the end user is quite  
20    significant if they have an opportunity to opt-out once  
21    and have that work for all of the millions of legitimate  
22    folks who are going to use the Do Not E-mail List.

23            There is the ongoing problem of people engaging  
24    in illegal behavior, and that is an enforcement problem  
25    but doesn't necessarily negate the value of creating a

1 system. It's based upon the premise that people will be  
2 law abiding.

3 MR. SALSBURG: Do you all have any thoughts on  
4 possible ways of operating a Do Not E-mail Registry and  
5 things we should be looking at?

6 MR. STEVE ATKINS: If I'm putting one together,  
7 I would have three levels of Registry. I would allow  
8 domains to opt-out. I would allow individual e-mail  
9 addresses within those domains to opt back in again, and  
10 I would allow individual e-mail addresses to opt-out, and  
11 that I believe is as good as you can do technically to  
12 give those people who are impacted by implicit e-mail the  
13 choice that they really need to have. Combine that with  
14 vigorous enforcement, they might even have some effect.

15 MR. SALSBURG: Ray or Laura, any other  
16 comments?

17 MR. EVERETT-CHURCH: Ray Everett-Church. I  
18 would concur with Steve's assessment there.

19 MS. LAURA ATKINS: As would I.

20 MR. EVERETT-CHURCH: I've learned never to argue  
21 with Steve.

22 MS. LAURA ATKINS: I've learned never to argue  
23 with him on technical matters.

24 MR. SALSBURG: Do you all have any other people  
25 you think we should talk to?

1           MR. STEVE ATKINS: Rodney Joffe, he has set up  
2 a perfectly, technically e-mail opt-out list. He also  
3 -- his main business is list forcing and list management,  
4 direct mail industry, and he's very technically savvy.  
5 Pretty much he can answer accurately any of your questions  
6 on the operational issues of such a list.

7           MR. EVERETT-CHURCH: This is Ray  
8 Everett-Church. Rodney should absolutely be on your  
9 list of folks to have this conversation with because he  
10 set up a Do Not E-mail List several years ago as sort of  
11 a test bed at the time when the direct marketing  
12 industry was saying that all they needed was a self  
13 regulating Do Not E-mail List, and that would cure all  
14 ills and he demonstrated that a list could be  
15 technically well, organized well, implemented and  
16 without vigorous enforcement would be completely ignored  
17 and useless.

18           MR. SALSBURG: Okay. Well, we're going to turn  
19 it over now to Michelle and Julie, who are going to ask  
20 questions about the report we need to do on a reward  
21 system, but we want to thank you for taking the time to  
22 speak with us, and if you have any questions or  
23 additional thoughts, please feel free to give us a call.

24           MR. EVERETT-CHURCH: This is Ray  
25 Everett-Church. Thank you all for this opportunity to



1     talk about the Do Not E-mail List.  It's clearly an  
2     important issue and one that I think many consumers are  
3     eagerly waiting the FTC's input.

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C E R T I F I C A T I O N   O F   R E P O R T E R

MATTER NUMBER: P044405

CASE TITLE: INTERVIEWS IN CAN-SPAM REPORT TO CONGRESS

HEARING DATE: FEBRUARY 10, 2004

I HEREBY CERTIFY that the transcript contained  
herein is a full and accurate transcript of the tapes  
transcribed by me on the above cause before the FEDERAL  
TRADE COMMISSION to the best of my knowledge and belief.

DATED: FEBRUARY 25, 2004

DEBRA L. MAHEUX

C E R T I F I C A T I O N   O F   P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript  
for accuracy in spelling, hyphenation, punctuation and  
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